REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 5 OF 2016

BETWEEN

DAVID WAFULA ……..……..…..……..……. APPELLANT

AND

REPUBLIC …..…….……. RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B. Kasavuli dated 28th January 2016 at Senior Resident Magistrate's Court at Winam in Criminal Case No. 2461 of 2009)

JUDGMENT

1. The appellant, **DAVID WAFULA**, was charged with the offence of attempted defilement contrary to **section 9(1)** and **(2)** of the ***Sexual Offences Act, 2006***. The particulars of the offence were that on 30th July 2009 at 3.00pm at [Particulars withheld] area in Kisumu East District, he attempted to penetrate H K, a child aged 7 years. He was tried, convicted and sentenced to 10 years imprisonment.

2. Although several issues were raised in support of the appeal, the only issue necessary for determination of this appeal is whether the learned magistrate was right to proceed with trial without complying with **section 200** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***

3. The trial in the subordinate court commenced before Hon. C.N. Sindani, RM who took the testimony of three prosecution witnesses and put the appellant on his defence. On 28th October 2014, Hon. Kasavuli, SRM took over the conduct of the matter and proceeded to take the accused's defence without complying with **section 200** of the ***Criminal Procedure Code*** which, at **section 200(3)**, which states as follows:

> *Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.* [Emphasis mine]

4. The provision cited is mandatory in nature in so far as the accused is granted the right to make an election as to whether the trial should start afresh. In this case the learned magistrate fell into error by failing to inform the appellant of his right to elect whether to recall witnesses. In the circumstances, I find and hold that the trial that proceeded was a nullity and as a result I quash the conviction and sentence.

5. As to whether I should order a retrial, I find the case of ***Laban Kimondo Karanja v Republic*** **NYR HCCRA No. 310, 311 and 312 of 2001 [2006]eKLR** apposite. The court summarised the principles applicable in determining whether the court should order a re-trial as follows;

At the end, ... the principles an appellate court should apply in determining whether to order a retrial are as follows:-

i. A retrial may be ordered only when the original trial, was illegal or defective.

ii. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interest of justice require it and where it is not likely to cause an injustice to an injustice to an accused person.

iii. A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result.

6. I have reviewed the nature and gravity of the offence and I find that there is overwhelming evidence against the appellant. Although the appellant was charged in 2009, he released on bail during the trial and was convicted January 2016. He has spent 8 months in prison and taking into consideration all these facts, I think it is the interests of justice that the appellant is retried.

7. The appellant shall remain in custody and be taken to retrial before the Senior Resident Magistrates Court at Winam on **12th August 2016** before any other magistrate other than Hon. B. Kasavuli. The trial shall proceed expeditiously and shall be completed within 6 months from the date hereof.

DATED and DELIVERED at KISUMU this 11th day of August 2016.

D.S. MAJANJA

JUDGE

Ms Kagoya, Advocate for the appellant.

Ms Osoro, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.